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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 9, 12, and 52

[FAC 2005-85; FAR Case 2015-011; Item No. I; Docket No. 2015-0011; Sequence No. 1]

RIN 9000-AN05

**Federal Acquisition Regulation: Prohibition on Contracting
with Corporations with Delinquent Taxes or a Felony Conviction**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement sections of the Consolidated and Further Continuing Appropriations Act, 2015, to prohibit the Federal Government from entering into a contract with any corporation having a delinquent Federal tax liability or a felony conviction under any Federal law, unless the agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

DATES: Effective date: February 26, 2016.

Comment date: Interested parties should submit written comments to the Regulatory Secretariat on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by FAC 2005-85, FAR Case 2015-011, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2015-011". Select the link "Comment Now" that corresponds with "FAR Case 2015-011". Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2015-011" on your attached document.

- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Ms. Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405-0001.

Instructions: Please submit comments only and cite FAC 2005-85, FAR Case 2015-011, Prohibition on Contracting with Corporation with Delinquent Taxes or a Felony Conviction, in all correspondence related to this case. Comments received generally will be posted without change to <http://regulations.gov>, including any personal and/or business confidential information provided. To confirm

receipt of your comment(s), please check

www.regulations.gov, approximately two to three

Days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, at 202-219-0202 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2005-85, FAR Case 2015-011.

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule amends the FAR to implement sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and section 523 of Division B of the same act.

A. Representation.

This rule requires that all offerors responding to Federal solicitations make a representation regarding whether the offeror is a corporation with a delinquent tax liability or a felony conviction under Federal law, as required by sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act,

2015 (Pub. L. 113-235) (and similar provisions in subsequent appropriations acts).

When an offeror provides an affirmative response in paragraph (b)(1) or (2) to the representation, the contracting officer is required to request additional information from the offeror and notify the agency official responsible for initiating debarment or suspension action. The contracting officer shall not make an award to the corporation unless an agency suspending or debarring official has considered suspension or debarment of the corporation and determined that this further action is not necessary to protect the interests of the Government.

B. Certification.

This rule also adds a certification requirement regarding tax matters, in solicitations for which the resultant contract (including options) may have a value greater than \$5,000,000, and that will use funds made available by Division B of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) (and similar provisions in subsequent appropriations acts).

Agencies funded by these acts include the Department of Commerce, the Department of Justice, NASA, as well as some smaller agencies.

If the certification regarding tax matters is applicable, then the contracting officer shall not award any contract in an amount greater than \$5,000,000, unless the offeror affirmatively certified in its offer to all the required certifications regarding tax matters in FAR Clause 52.209-12(b).

This certification will not be included in the annual representations and certifications, because it has very limited application. In accordance with 41 U.S.C. 1304, the certification included in this regulation is specifically required by statute, and therefore its inclusion in the FAR does not require the written approval of the Administrator for Federal Procurement Policy.

C. Applicability to Commercial Items (Including Commercially Available Off-the-Shelf (COTS) Items) and Acquisitions Not Greater than the Simplified Acquisition Threshold.

This interim rule implements sections 744 and 745 of Division E, Title VII, and section 523 of Division B, Title V, of the Consolidated and Further Continuing Appropriations Act, 2015. Sections 744 and 745 of Division E prohibit any Federal agency from using funds appropriated or otherwise made available by the Act or any other act to enter into a contract with a corporation that has

delinquent unpaid taxes or has been convicted of a felony criminal violation under any Federal law within the past 24 months, unless the Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the government. Section 523 of Division B, which affects Commerce, Justice, NASA, and some smaller agencies, requires certification with regard to violations of certain tax matters.

The FAR Council and the Administrator for Federal Procurement Policy have determined that it is not in the best interest of the United States to exempt contracts for the acquisition of commercial items (including commercially available off-the-shelf items) or acquisitions in amounts not greater than the simplified acquisition threshold (other than the certification requirement), because it imposes a minimal burden (just a representation or, in limited instances, a certification), in contrast to the benefit of avoiding awarding contracts to corporations that have delinquent unpaid taxes, or felony convictions for violations of Federal Law, or to prospective contractors with other violations relating to Federal tax matters. Tax liability is a serious matter and Congressional hearings (e.g., the Permanent Subcommittee on Investigations,

Committee on Homeland Security and Governmental Affairs, U.S. Senate, held a hearing on May 24, 2011, entitled, "Stimulus Contractors Who Cheat On Their Taxes: What Happened?," and the Subcommittee on Government Management, Organization, and Procurement, Committee on Oversight and Government Reform, House of Representatives held a hearing on April 19, 2007, also concerning Federal contractors who abuse the Federal tax system) have been held to identify ways to ensure that funds are not spent with contractors with tax delinquencies. It is in the interest of the United States to only award contracts to entities that are responsible and law-abiding.

This determination is consistent with the current coverage in paragraph (h)(4) of the FAR clause at 52.212-3, Offeror Representations and Certifications - Commercial Items, which requires offerors to represent whether they have, within a three-year period preceding their offer, been notified of any delinquent Federal taxes in an amount that exceeds \$3,500 for which the liability remains unsatisfied.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to

select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

Although DoD, GSA, and NASA do not expect that this change will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, et seq., an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows:

This action is necessary to implement sections 744 and 745 of Division E of the Consolidated and Continuing Further Appropriations Act, 2015 (Pub. L. 113-235) (and similar provisions in subsequent appropriations acts), to prohibit using any of the funds made available under that or any other act to enter a contract with any corporation with any delinquent Federal tax liability or a felony conviction, unless an agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

The rule also implements section 523 of Division B of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) (and similar provisions in subsequent appropriations acts). This section prohibits the award of

any contract in an amount greater than \$5,000,000, using funds appropriated under Division B of the Consolidated and Continuing Further Appropriations Act, 2015, unless the offeror affirmatively certifies that it has filed all Federal tax returns required during the three years preceding the certification; has not been convicted of a criminal offense under the Internal Revenue Code of 1986; and has not, more than 90 days prior to certification, been notified of any unpaid Federal tax assessment for which the liability remains unsatisfied, unless the assessment is the subject of an installment agreement or offer in compromise that has been approved by the Internal Revenue Service and is not in default, or the assessment is the subject of a non-frivolous administrative or judicial proceeding.

The objective of the interim rule is to prohibit award to entities that are delinquent in the payment of Federal taxes or have been convicted of a felony under Federal law. The legal basis for the rule is the above cited statutes.

Based on current data with regard to active registrants in the System for Award Management (SAM), the rule will apply to approximately 65,000 small business concerns, which are required to complete the annual representations and certifications at least once per year in order to keep their registration in SAM current.

The information collection requirement imposed by this rule is minimal - it is a brief representation, and in some cases also a certification. Each representation is estimated to require an average of six minutes to complete.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD, GSA, and NASA were unable to identify any significant alternatives that would reduce the impact on small businesses and still meet the objectives of the statute. However, other than the potential for not receiving award if the small entity is delinquent in payment of Federal taxes or has been convicted of a felony, there is no significant economic impact on small entities because the information collection burden imposed by the rule is minimal.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other

interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2015-011), in correspondence.

IV. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. The rule contains information collection requirements. The Office of Management and Budget (OMB) has cleared this information collection requirement under OMB Control Number 9000-0193, titled: Prohibition on Contracting with Corporations with Delinquent Taxes or a Felony Conviction.

A. Public Reporting Burden.

The public reporting burden for this collection of information is estimated to average .1 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

1. 52.209-11 Representation:

The annual reporting burden for 52.209-11 is estimated as follows:

Respondents: 352,000.

Responses per respondent: Approximately 1.01.

Total annual responses: 355,520.

Preparation hours per response: .1 hours.

Total response Burden Hours: 35,552.

2. 52.209-12 Certification:

The annual reporting burden for 52.209-12 is estimated as follows:

Respondents: 440.

Responses per respondent: 3.

Total annual responses: 1320.

Preparation hours per response: .1 hours.

Total response Burden Hours: 132.

3. Total:

The average annual reporting burden is estimated as follows:

Total annual responses: 356,840.

Preparation hours per response: .1 hours.

Total response Burden Hours: 35,684.

B. Request for Comments Regarding Paperwork Burden.

Submit comments, including suggestions for reducing this burden, not later than **[insert date 60 days after date**

of publication in the FEDERAL REGISTER] to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405-0001.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requesters may obtain a copy of the supporting statement from the General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Flowers, 1800 F Street NW., 2nd Floor, Washington, DC 20405-0001. Please cite OMB Control Number 9000-0193, Prohibition on Contracting with Corporations with Delinquent Taxes or a Felony Conviction, in all correspondence.

V. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because these appropriations act restrictions apply to all funds appropriated under the respective acts, and it is important to provide immediate direction to contracting officers, so that they do not inadvertently violate the conditions placed upon the expenditure of the funds. The effective date is set as February 26, 2016, to allow the Government to conform its procurement databases. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 4, 9, 12, and 52

Government procurement.

Dated: November 20, 2015.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,

Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA and NASA amend 48 CFR parts 1, 4, 9, 12, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1, 4, 9, 12, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

2. Amend section 1.106 in the table following the introductory text by adding, in sequence, FAR segments "52.209-11" and "52.209-12" and their corresponding OMB Control number "9000-0193".

PART 4—ADMINISTRATIVE MATTERS

3. Amend section 4.1202 by redesignating paragraphs (a)(8) through (29) as paragraphs (a)(9) through (30), respectively; and adding a new paragraph (a)(8) to read as follows:

4.1202 Solicitation provision and contract clause.

(a) * * *

(8) 52.209-11, Representation by Corporations
Regarding Delinquent Tax Liability or a Felony Conviction
under any Federal Law.

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

4. Amend section 9.104-5 by revising the section
heading and paragraph (b) and adding paragraphs (c) and (d)
to read as follows:

**9.104-5 Representation and certifications regarding
responsibility matters.**

* * * * *

(b) The provision at 52.209-11, Representation by
Corporations Regarding Delinquent Tax Liability or a Felony
Conviction under any Federal Law, implements sections 744
and 745 of Division E of the Consolidated and Further
Continuing Appropriations Act, 2015 (Pub. L. 113-235) (and
similar provisions in subsequent appropriations acts).
When an offeror provides an affirmative response in
paragraph (b)(1) or (2) of the provision at 52.209-11 or
paragraph (q)(2)(i) or (ii) of provision 52.212-3, the
contracting officer shall—

(1) Promptly, upon receipt of offers, request such
additional information from the offeror as the offeror

deems necessary in order to demonstrate the offeror's responsibility to the contracting officer (but see 9.405);

(2) Notify, in accordance with agency procedures (see 9.406-3(a) and 9.407-3(a)), the agency official responsible for initiating debarment or suspension action; and

(3) Not award to the corporation unless an agency suspending or debarring official has considered suspension or debarment of the corporation and made a determination that suspension or debarment is not necessary to protect the interests of the Government.

(c) If the provision at 52.209-12, Certification Regarding Tax Matters, is applicable (see 9.104-7(e)), then the contracting officer shall not award any contract in an amount greater than \$5,000,000, unless the offeror affirmatively certified in its offer, as required by paragraph (b)(1), (2), and (3) of the provision.

(d) Offerors who do not furnish the representation or certifications or such information as may be requested by the contracting officer shall be given an opportunity to remedy the deficiency. Failure to furnish the representation or certifications or such information may render the offeror nonresponsible.

5. Amend section 9.104-7 by adding paragraphs (d) and (e) to read as follows:

9.104-7 Solicitation provisions and contract clauses.

* * * * *

(d) The contracting officer shall insert the provision 52.209-11, Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law, in all solicitations.

(e) For agencies receiving funds subject to section 523 of Division B of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and similar provisions in subsequent appropriations acts, the contracting officer shall insert the provision 52.209-12, Certification Regarding Tax Matters, in solicitations for which the resultant contract (including options) may have a value greater than \$5,000,000. Division B of the Consolidated and Continuing Further Appropriations Act, 2015 appropriates funds for the following agencies: the Department of Commerce, the Department of Justice, the National Aeronautics and Space Administration, the Office of Science and Technology Policy, the National Science Foundation, the Commission on Civil Rights, the Equal Employment Opportunity Commission, the U.S. International Trade Commission, the Legal Services Corporation, the

Marine Mammal Commission, the Office of the United States Trade Representative, and the State Justice Institute.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

6. Amend section 12.301 by redesignating paragraphs (d) (4) through (6) as paragraphs (d) (5) through (7), respectively, and adding a new paragraph (d) (4) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(d) * * *

(4) Insert the provision at 52.209-12, Certification Regarding Tax Matters, as prescribed at 9.104-7(e).

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Amend section 52.204-8 by—

- a. Revising the date of the provision;
- b. Redesignating paragraphs (c) (1) (vii) through (xxi) as (c) (1) (viii) through (xxii), respectively; and
- c. Adding a new paragraph (c) (1) (vii).

The revision and addition read as follows:

52.204-8 Annual Representations and Certifications

* * * * *

ANNUAL REPRESENTATIONS AND CERTIFICATIONS (FEB 2016)

* * * * *

(c) (1) * * *

(vii) 52.209-11, Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law. This provision applies to all solicitations.

* * * * *

8. Add sections 52.209-11 and 52.209-12 to read as follows:

52.209-11 Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law.

As prescribed in 9.104-7(d), insert the following provision:

REPRESENTATION BY CORPORATIONS REGARDING DELINQUENT TAX LIABILITY OR A
FELONY CONVICTION UNDER ANY FEDERAL LAW (FEB 2016)

(a) As required by sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235), and similar provisions, if contained in subsequent appropriations acts, the Government will not enter into a contract with any corporation that—

(1) Has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is

not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless an agency has considered suspension or debarment of the corporation and made a determination that suspension or debarment is not necessary to protect the interests of the Government; or

(2) Was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless an agency has considered suspension or debarment of the corporation and made a determination that this action is not necessary to protect the interests of the Government.

(b) The Offeror represents that—

(1) It is ☐ is not ☐ a corporation that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability; and

(2) It is ☐ is not ☐ a corporation that was convicted of a felony criminal violation under a Federal law within the preceding 24 months.

(End of provision)

52.209-12 Certification Regarding Tax Matters

As prescribed in 9.104-7(e), insert the following provision:

CERTIFICATION REGARDING TAX MATTERS (FEB 2016)

(a) This provision implements section 523 of Division B of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235), and similar provisions, if contained in subsequent appropriations acts.

(b) If the Offeror is proposing a total contract price that will exceed \$5,000,000 (including options), the Offeror shall certify that, to the best of its knowledge and belief, it—

(1) Has ☐ filed all Federal tax returns required during the three years preceding the certification;

(2) Has not ☐ been convicted of a criminal offense under the Internal Revenue Code of 1986; and

(3) Has not [], more than 90 days prior to certification, been notified of any unpaid Federal tax assessment for which the liability remains unsatisfied, unless the assessment is the subject of an installment agreement or offer in compromise that has been approved by the Internal Revenue Service and is not in default, or the assessment is the subject of a non-frivolous administrative or judicial proceeding.

(End of provision)

9. Amend section 52.212-3 by—

- a. Revising the date of the provision;
- b. Removing from the introductory text and the first undesignated paragraph in paragraph (b) (2) “through p” and adding “though q” in their places, respectively; and
- c. Adding paragraph (q).

The revision and addition read as follows:

52.212-3 Offeror Representations and Certifications—

Commercial Items.

★ ★ ★ ★ ★

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (FEB 2016)

★ ★ ★ ★ ★

(q) Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law. (1) As required by sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235), and similar provisions, if contained in subsequent appropriations acts, The Government will not enter into a contract with any corporation that—

(i) Has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless an agency has considered suspension or debarment of the corporation and made a determination that suspension or debarment is not necessary to protect the interests of the Government; or

(ii) Was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless an agency has considered suspension or

debarment of the corporation and made a determination that this action is not necessary to protect the interests of the Government.

(2) The Offeror represents that—

(i) It is ☐ is not ☐ a corporation that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability; and

(ii) It is ☐ is not ☐ a corporation that was convicted of a felony criminal violation under a Federal law within the preceding 24 months.

(End of provision)

[Billing Code 6820-EP]

[FR Doc. 2015-30456 Filed: 12/3/2015 8:45 am; Publication Date: 12/4/2015]